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PETITION NOT PRINTED

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1948

No. 187 Misc.

MABEL MONROE BONDS,

Petitioner,

vs.

SHERBURNE MERCANTILE COMPANY, a Corporation, and HUGH BLACK,

Respondents.

RESPONDENTS' BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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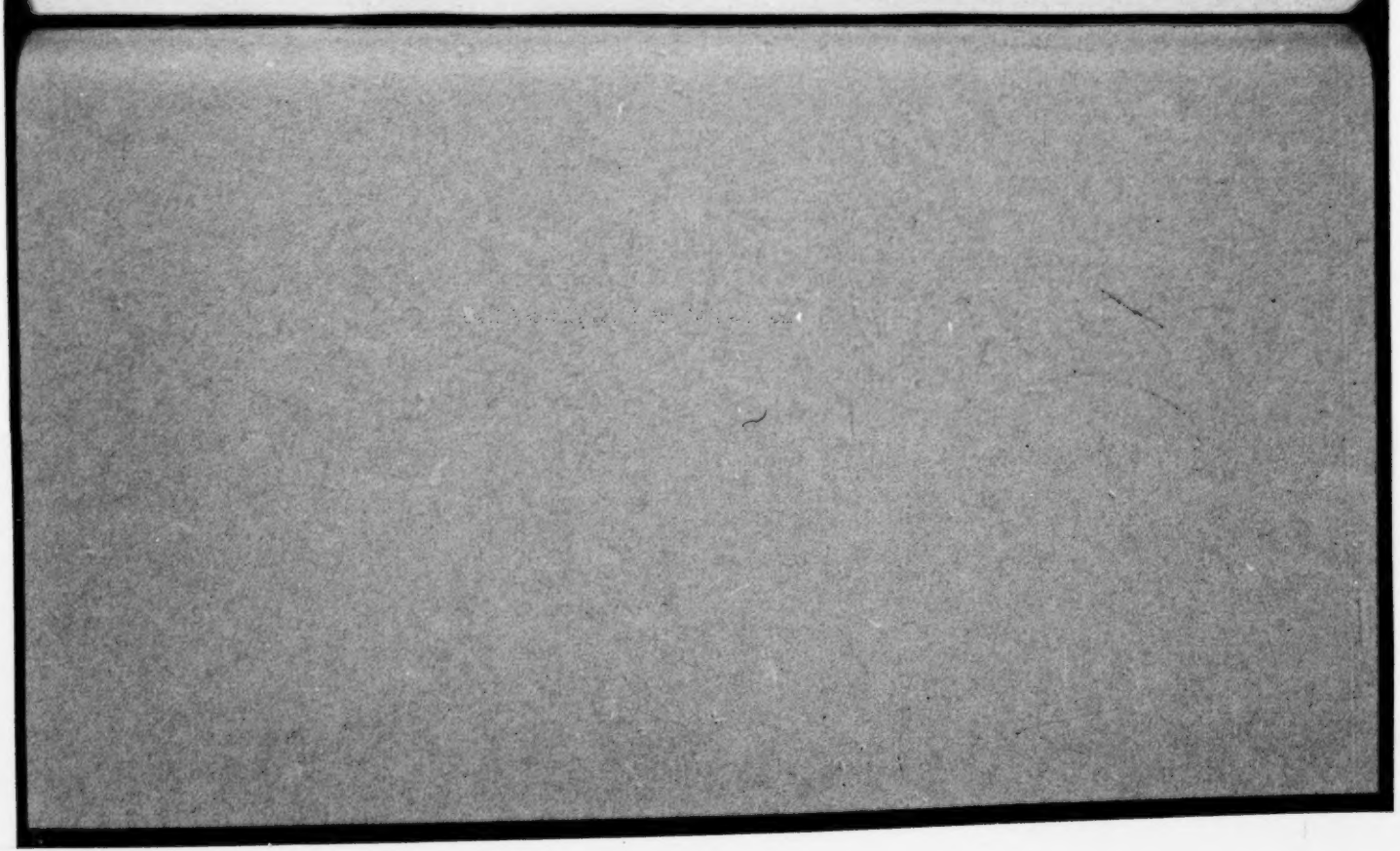

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TO THE HONORABLE the Supreme Court of the United States:

Respondents, Sherburne Mercantile Company, a corporation, and Hugh Black, respectfully pray that the Petition for a Writ of Certiorari filed herein by Petitioner be denied, and submit the following in support thereof:

THE QUESTIONS FOR REVIEW, IF CERTIORARI WERE GRANTED, INVOLVE NO GROUNDS JUSTIFYING INVASION OF THE SUPREME COURT'S JURISDICTION.

A: Corrective Statement of the Case

"When the real situation is not set forth in the petition, a duty rests on opposing counsel to reveal it in their reply."

O'Brien "Manual of Federal Appellate Procedure" (third edition, 1941), page 304, citing *Furness, Withy & Co. vs. Yangtsze Insurance Assn.*, 242 U. S. 430, 37 S. Ct. 141, 61 L. Ed. 409.

A proper understanding of the real issue which was presented to the United States District Court in and for the District of Montana for consideration upon Respondents' Motion for Summary Judgment, which issue that court decided *as an issue of law* in favor of Respondents, and on such basis rendered Judgment for Respondents, and which decision, upon such issue, the Circuit Court of Appeals for the Ninth Circuit affirmed upon appeal (rehearing denied) can *not* be gathered either from the Petition for a Writ of Certiorari or from the Brief in support thereof.

This proposition is so stated deliberately and after careful consideration of both the Petition and the supporting Brief.

For such understanding, the history of this, and related litigations between these parties must be borne in mind:

On February 16, 1942, Petitioner filed this action in the District Court of the United States for the District of Montana, it being an action to quiet title to the lands

here involved against the claims of Respondents. (R. 3-10)

Respondents' answer to this complaint contained denials of the various allegations of the complaint (along with certain admissions), and in addition set up five separate affirmative defenses thereto. (R. 16-22)

Petitioner thereafter filed her Reply. (R. 32)

Thereafter, by leave of court obtained, Respondents filed a Pleading Supplemental to Answer. (R. 59-215)

The Pleading Supplemental to Answer pleaded additional facts (occurring subsequent to the filing of the Answer) particularly with reference to the Fourth Affirmative Defense, which, in brief, pleaded a defense of *Res Judicata*. Taken together, the Fourth Affirmative Defense and the Pleading Supplemental to Answer pleaded the following as one of the affirmative defenses to the action:

(1) That on April 12, 1941, Respondent, Sherburne Mercantile Company, had commenced an action in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Glacier, to quiet title to the lands involved in this present action (which was not commenced in the Federal District Court for Montana until February 16, 1942) and that Mabel Monroe Bonds (the same person as the Petitioner herein) was named as a defendant therein. (R. 68-69)

(2) That on June 15, 1942, the Montana State Court had given judgment decreeing Respondent to be the owner of the lands here in question and quieting its title thereto as against Petitioner and that said action involved the same cause of action as is involved in Petitioner's present federal court action. (R. 19-21)

(3) That the judgment of the Montana state lower court had been affirmed in Respondent's favor upon Petitioner's appeal to the Supreme Court of Montana and that the same had in all respects become a final judgment. (R. 59-61)

A complete transcript of the record in the Montana state lower court, as well as the opinion of the Montana Supreme Court on the appeal, was set forth as an exhibit to the Pleading Supplemental to Answer. (R. 62-215)

That record, as considered and passed upon by the Montana state courts, disclosed the following situation:

1. The issue presented by Respondent's Complaint was a claim of title to the lands here involved as against Petitioner's claims thereto. (R. 68-69)

2. Petitioner's Answer denied Respondent's title, set up various affirmative defenses, and contained a counterclaim wherein she affirmatively prayed the Montana state court to quiet title in fee simple in her. (R. 71-94)

3. The evidence, adduced at the trial in the Montana court, disclosed the following history:

(a) That on February 28, 1918, a trust patent to this land issued to Petitioner. (R. 166-168)

(b) That on December 12, 1918, a fee patent, without restrictions, was executed by the United States to Petitioner. (R. 159-161)

(c) A receipt for the *fee* patent, dated September 25, 1919, and signed "Mabel H. Monroe." (R. 170)

(d) Testimony by Mabel H. Monroe (the Petitioner herein) that she had heard patents were being issued and wrote for hers in 1919. (R. 173)

(e) The letter so written by Petitioner. (R. 179)

(f) The Judgment roll in an action brought by Respondent herein against Petitioner to foreclose a mortgage on these lands here in question executed by Petitioner to Respondent on October 13, 1920. (R. 121-145). It contained an Answer verified by said Mabel H. Monroe before a Notary Public (R. 139-140) and a Judgment and Decree rendered November 16, 1922, decreeing the foreclosure of the mortgage. (R. 141-145)

(g) Evidence that the Sheriff sold the land pursuant to Decree of Foreclosure in the action referred to in paragraph (f) above, that Respondent purchased it, and that on December 20, 1923, Sheriff's Deed issued to Respondent, Sherburne Mercantile Company. (R. 147-159)

4. On this basis the Montana state lower court on June 15, 1942, rendered judgment quieting title in Respondent, Sherburne Mercantile Company, adjudging it to be the true and lawful owner of the property, decreeing any claims of Petitioner, Mabel Monroe Bonds to the premises to be invalid and groundless, and perpetually enjoining her from setting up any claims thereto. (R. 205-206)

5. Petitioner was represented by counsel throughout the proceedings in the Montana state court (R. 118-119) and herself appeared and testified at the trial. (R. 171-181)

She affirmatively asked the court to *quiet title in fee simple in herself*. (R. 92-94)

She attacked Respondent's title on the following grounds, among others:

(a) That the note and mortgage were invalid. (R. 71-94)

(b) That she as an Indian ward received a trust patent under Section 348 of Title 25 USCA, that Respondent,

without her knowledge or consent, had a fee patent issued to her and then fraudulently took and foreclosed a mortgage on the land. (R. 107-117)

She proposed findings of fact and conclusions of law embracing the issues of trust patent, "forced" fee patent, Indian ward, etc. (R. 207-212)

6. Petitioner appealed the decree in favor of Respondent to the Supreme Court of Montana (R. 214) which on February 10, 1944, affirmed the Decree (R. 62-64). No petition for rehearing was filed, and on February 28, 1944, the Supreme Court of Montana issued its remittitur affirming the Decree of the lower court, which was filed on March 1, 1944 (R. 59-60). In connection with her appeal, Petitioner's Bill of Exceptions was stricken from the record for failure to present the same for settlement within the time allowed by law. (R. 62 and opinion as reported in Sherburne Mercantile Co. v. Bonds, 115 Montana 464, 145 Pac. (2d) 827).

7. Petitioner made no effort to obtain review of the decision of the Montana courts by the Supreme Court of the United States either by appeal or application for writ of *certiorari;* the Montana judgment became final; and thereupon and thereafter and on December 13, 1944, Respondent filed in the Federal district court below its Pleading Supplemental to Answer, setting forth the complete record of all proceedings had in the state court. (R. 59 FF.)

Following the filing of the Pleading Supplemental to Answer alleging the foregoing facts, a pretrial hearing was had, as a result of which it was stipulated between the parties as follows:

"That Plaintiff admits all of the allegations of the Fourth Affirmative Defense with regard to the action

in the state court as set forth in the answer of the defendants herein, and that plaintiff likewise admits all of the allegations of the defendants' Pleading Supplemental to Answer with regard to the action in the state court, except that plaintiff does not admit the conclusion therein set forth that the Decree and Judgment is *res judicata,* but leaves the determination of such matter to the Court as a matter of law." (R. 227-228)

As a result of this stipulation, admitting these facts, a clear issue of law was presented as to whether the Montana State Court proceedings, in themselves, constituted a valid defense of *res adjudicata* in the present action so that this case should be dismissed without the necessity of trying and determining the other complicated issues raised by the complaint, the answer and the other defenses therein contained, and the reply.

Respondents brought this issue of law as to the validity of the defense of *Res Judicata* up for determination by Motion for Summary Judgment (R. 248) and the Court entertained and granted that Motion upon this basis (R. 251-252, 254) and accordingly entered Judgment for Respondent. (R. 256)

From the judgment so entered, Petitioner appealed to the Circuit Court of Appeals. (R. 260)

It affirmed this judgment (R. 305) and denied Petitioner's petition for rehearing. (R. 306)

If the Supreme Court of the United States should grant *certiorari,* its review would, on this record, be limited to consideration of one single question and no more, namely:

Is the final judgment of the courts of the State of Montana *res adjudicata* in the action later brought upon

identical issues by Petitioner as an individual in the Federal District Court of Montana?

Both the Federal District Court and the Circuit Court of Appeals decided that it was *res adjudicata.*

From the foregoing it is apparent that Petitioner's Statement of Questions Presented (Petition pages 2-6) embraces questions which would not be before the Supreme Court if certiorari were granted. The Montana state court as a basis for its final judgment necessarily decided that a valid fee patent issued, that it was not "forced," that the mortgage given by Petitioner was an enforceable obligation and that Respondent by purchase at sheriff's sale on the foreclosure thereof obtained good title to the lands.

From the foregoing it is likewise apparent that Petitioner's "Statement of Facts" embraced in question 4 (Petition pages 3-5) does not correctly portray the true situation. It is *not* undisputed that a "forced" fee patent issued to Petitioner—rather the judgment of the Montana state court is that a valid fee patent issued. The Circuit Court of Appeals so held in its decision below:

"It is hence not a 'forced' fee patent" * * * (R. 302; 169 Fed 2d at 436).

It is likewise evident that the Specifications of Error are too broad for the same reasons that Petitioner's list of questions presented is too broad—they go beyond the particular issue presented.

B: No Adequate Reason Exists for Allowing the Writ.

The allowance of the Writ, if granted, would be pursuant to Rule 38 par. 5(b) of the Rules of the Supreme Court of the United States.

Respondent submits that there are no special and important reasons therefor in this case:

1. There is no conflict between the decision of the Circuit Court of Appeals of the Ninth Circuit and any decision of any other Circuit Court of Appeals on the same matter.

2. There is no decision of any question of local law involved either in a way probably in conflict with applicable local decisions or at all.

3. There is no decision as to a question of federal law which has not been, but should be, settled by the Supreme Court; rather the decision is in harmony with Supreme Court decisions and with the accepted and usual course of judicial proceedings. The following quotations from the Circuit Court's opinion so demonstrate:

> "We think the district court of the State of Montana had jurisdiction in personam over appellant to determine her title, if any, to the land in question."
>
> "Considering the provision of that statute that the exclusive jurisdiction of the United States ceases upon the issuance of a fee patent, in connection with its remaining provisions, we construe this section in favor of the Indian (United States v. Nez Perce Co., Idaho 9 Cir., 95 F. 2d. 232, 236), and hold that it confers on an Indian receiving a valid fee patent before the expiration of the 25-year patent, the right to sue in the state courts to establish her title against the claim of the appellee. Cf. Larkin v. Paugh, 276 U. S. 431, 439, 48 S. Ct. 366, 72 L. Ed. 640)."
>
> "Appellant alleged in her state court cross complaint that a trust patent had been issued to her in 1918, the allegation being that 'the United States, through the office of the Commissioner of Indian Affairs and the Department of the Interior, issued a patent in fee to the said described lands to the defendant without her application therefor and against her will and without

her consent or knowledge.' Having admitted the issuance to her of the fee patent by these officers' action, it is presumed that they performed their official duties and that the Secretary of the Interior had found to his satisfaction that she was then 'competent and capable of managing * * * her affairs.' Minter v. Crommelin, 18 Howard 87, 89, 15 L. Ed. 279."

"The bill of exceptions shows that the fee patent dated December 12, 1918, was issued to her at her written request, dated September 16, 1919, and the deed recorded in the County Recorder's office February 20, 1920. Having so sought the fee patent, it is a matter of indifference whether she or the United States filed the requested patent for record. United States v. Schurz, 102 U. S. 378, 26 L. Ed. 167."

"It is hence not a 'forced' fee patent as in United States v. Benewah County, Idaho, 9 Cir., 290 F. 628, 630; cf. United States v. Nez Perce Co., 9 Cir., Idaho, 95 F. 2d. 232, 233."

"Appellant has sought the state court's jurisdiction for a contrary decision and had proved her right to invoke that jurisdiction by her testimony and letter seeking the fee patent, and its issuance to her. Having invoked the jurisdiction she—so having the fee in the land—is bound by the court's decision that she had given a mortgage of that fee. Even if erroneously decided, she cannot collaterally attack that decision on the ground she contended in that suit, namely that the mortgage was fraudulently obtained from her; also that it was for a debt prior to the fee patent and hence invalid under Section 354 of 25 U. S. C. A.; also that she was not served and had not appeared in the earlier foreclosure suit, and that the sheriff's notice of sale was defective.

"Appellant's sole remedy for such error is by appeal and certiorari to the Supreme Court."

"Nor can appellant in a federal court collaterally attack the state court judgment because there were other grounds for the invalidity of its quieting the title against her, not presented in that case. Northern Pa-

cific Co. v. Slaght, 205 U. S. 122, 27 S. Ct. 442, 51 L. Ed. 738; Fulsom v. Quaker Oil & Gas Co., 8 Cir., 35 F. 2d. 84, 90."

"Appellant was competent to sue in her own right in the Montana state court and is not entitled to have her case tried anew in this federal proceeding."

From the foregoing it is apparent that the Circuit Court's decision did not prejudice any rights of the Blackfeet Indians by sanctioning "forced" fee patents as such, rather it simply decided that, a fee patent having issued, the Montana court had jurisdiction to determine questions of title to the land in a suit involving Petitioner as an individual and that the final decision of the Montana court (which was subject to final review by the Supreme Court of the United States if in error) was *res adjudicata*. In addition, the Circuit Court likewise decided that adequate grounds existed in the record as presented to the Montana Court to justify its determination that the fee patent was not "forced."

Petitioner contends that the decision below conflicts with Article VI of the Treaty and Agreement of 1887 (25 Stat. 113). That is absolutely impossible. Article VI (set out at page 40 of the Petition and Brief) clearly and specifically refers only to "any of the land ceded to the United States under the provisions of this agreement" and provides that an Indian who had settled on such land would be entitled to have *"the same"* allotted to him. Article II (set out on page 27 of the Appendix hereto) cedes to the United States all lands "not herein specifically set apart and reserved as separate reservations for them." The boundaries of the Blackfeet Reservation are then defined (see 25 Stat. at page 129, set out on page 27 of the Appendix hereto). These boundaries are those

now existing as shown on any map of Montana and it is immediately apparent that the land here involved, being in Section 34, Township 35 North, Range 14 West, Montana Meridian, Montana, is *within* the boundaries of the Reservation. In fact paragraph IV of Petitioner's Complaint below specifically so alleges (R. 5). Therefore this land was *not* a part of that ceded to the United States by the Treaty of 1887 and paragraph VI can have no application thereto.

In *Glacier County vs. Frisbee,* 117 Mont. 578, 164 Pac. 2d. 171, the Montana Supreme Court so construed the Treaty of 1887, saying (on page 176 of Pacific):

> "While Article VI of the agreement provided for trust allotments to Indians who had settled upon and made improvements to land, it referred only to land in the portions ceded to the United States."

Petitioner also contends that the Circuit Court of Appeals overlooked the effect of a provision of Section 372 of Title 25 U. S. C. A., arguing (Petition page 12) that this provision requires the Secretary of the Interior to issue a *certificate of competency* before issuing a fee patent, and arguing that Section 372 thus modifies Section 349 of the same title.

Section 372 provides (as far as here applicable):

> Section 372. "* * * Provided further, that the Secretary of the Interior is authorized in his discretion to issue a certificate of competency, upon application therefor, to any Indian, or in case of his death, to his heirs, to whom a patent in fee containing restrictions on alienation has been issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent. * * *"

Obviously it deals with a situation where a *fee patent* has already issued, which likewise contains certain restric-

tions on alienation. Section 372 permits removal of those restrictions *ipso facto* by issuance of a certificate of competency, without the necessity of issuing another fee patent.

Sections 348 and 349 provide (as far as here applicable):

"Section 348. Patents to be held in trust; descent and partition. Upon the approval of the allotments provided for in Sections 331 to 334, inclusive, and 336 by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. * * *"

"Section 349. At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: Provided, that the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. * * *"

Obviously these sections deal with a situation where, as here, a *trust* patent originally issued (R. 166) and thereafter the Secretary being "satisfied that any Indian allottee is competent" issues to him a patent in fee simple. In this case it is the issuance of the fee patent itself which removes the restrictions.

The distinction between these two types of patent is well recognized. *United States v. Bowling,* 256 U. S. 484, 41 S. Ct. 561, 65 L. Ed. 1054 says:

> "Before coming to the acts under which the Secretary of the Interior proceeded, it will be helpful to refer to the modes, long in use, by which Indians are prevented from improvidently disposing of allotted lands. One is to issue to the allottee a written instrument or certificate, called a trust patent, declaring that the United States will hold the land for a designated period, usually twenty-five years, in trust for the sole use and benefit of the allottees, or, in case of his death, of his heirs, and at the expiration of that period will convey the same to him, or his heirs, in fee, discharged of the trust and free of all charge or encumbrance. The other is to issue at once to the allottee a patent conveying to him the land in fee, and imposing a restriction upon its alienation for twenty-five years or some other stated period. While alienation is effectually restricted by either mode, allotments under the first are commonly spoken of as trust allotments, and those under the second as restricted allotments."

See also *U. S. v. Nez Perce County, Idaho,* 267 Fed. 495 at 496.

Section 372 is not applicable in the present case, since it deals with a situation where there is a fee patent with restrictions against alienation; in the present case we have first a Trust Patent (R. 166) and then a Patent in Fee Simple, without restrictions. (R. 159)

In the present case, it is Section 348 and 349 (and not

Section 372) which are applicable, as well as the following rule quoted from the Circuit Court decision:

> "Having admitted the issuance to her of the fee patent * * * it is presumed * * * that the Secretary of the Interior had found to his satisfaction that she was then 'competent and capable of managing * * * her affairs.' Minter v. Crommelin, 18 Howard 87, 89, 15 L. Ed. 279." (R. 301 and 169 F. 2d. 433 at 435).

There is no conflict with the decision in *United States vs. Rickert,* 188 U. S. 432, 23 S. Ct. 478, 47 L. Ed. 532, as that case involved a situation where only a trust patent had issued and the United States held title.

> "In other words the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future * * * he would be entitled to a regular patent conveying the fee." (Page 436 of 188 U. S.)

The case held that while title was in the United States, the lands were not subject to local taxation. The case can have no application to a situation where, as here, the "regular patent conveying the fee" has issued.

So, too, there is no conflict with *Choate v. Trapp,* 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941, which deals with a situation involving the Five Civilized Tribes in Oklahoma. Legal title to immense tracts of land was vested in the Tribes themselves for the benefit of all their members. Treaties were made and laws enacted whose purpose was to divide the lands into individual ownerships. They provided that if a member of the tribe would consent to division of the tribal lands of his tribe, he would be given a patent granting him individual ownership of a particular tract and furthermore that *so long as he retained the title his land would be exempt from taxation.*

The case holds that this created a vested right in the patentee to immunity from taxation not to be lost through subsequently enacted legislation. No such question is involved here. It is interesting to note that the case holds that under the laws and treaties there involved, acceptance by the Indian of a patent (not signed by him) constituted an affirmative consent by him to the division of all of the lands of his tribe:

> "After he accepted the patent, the Indian could not be heard, either at law or in equity, to assert any claim to the common property." (Page 674 of 224 U. S.)

The other two cases cited as giving rise to a conflict (Petition page 15) are *United States vs. Nez Perce County,* 95 Fed. 2d. 232, and *United States vs. Glacier County,* 17 Fed. Supp. 411, 99 Fed. 2d. 733.

Both cases were decided by the United States Circuit Court of Appeals for the Ninth Circuit, which is the court below here. In fact, Circuit Judge Healy, who delivered both of the above opinions, was one of the three Circuit Judges who heard the present case and joined in the unanimous decision in favor of Respondent.

The same Federal District Judge who decided the Glacier County case, and whose decision was affirmed by the Circuit Court, likewise decided the present case in favor of Respondent and again his decision was affirmed by the Circuit Court.

Both the *Nez Perce County* case and the *Glacier County* case involved exemption from local taxation, both stated that under the Act of May 8, 1906, 34 Stat. 182, 25 U. S. C. A. Sec. 349, the Secretary of the Interior can issue a patent in fee simple during the 25-year trust period only upon the application of the allottee *or with his consent.*

In the *Nez Perce* case the Circuit Court sent the case back for the taking of evidence regarding whether or not the Indian had consented and the making of a finding upon the ultimate fact of consent. (95 Fed. 2d. 232 at 235)

In the *Glacier County* case: "It is *stipulated* that the fee title was granted to the Indians without any application on their part and without their consent." (99 Fed. 2d. 733 at 734) (Emphasis supplied).

In the present case, consent was affirmatively shown and established:

> "The bill of exceptions shows that the fee patent dated December 12, 1918, was issued to her at her written request, dated September 16, 1919, and the deed recorded in the County Recorder's office February 20, 1920 * * *
>
> "It is hence not a 'forced' fee patent * * *" (R. 302; 169 Fed. 2d. 433 at 436).

Obviously there is no conflict between these decisions, no conflict within the Ninth Circuit, and no conflict between the Ninth Circuit and any other Circuit.

C: Conclusion

No reasons exist for granting certiorari and the Petition should be denied.

RESPONDENTS' BRIEF IN REPLY TO PETITIONER'S BRIEF

A: Argument

The specified errors will be discussed under the same headings and in the same order as in Petitioner's Brief.

Errors Nos. 1 and 3

Petitioner bases her entire argument, that the Montana court lacked jurisdiction to render a valid judgment, on the erroneous assumption that it is ***admitted*** that the fee patent issued without application or consent

or finding of competency. The Circuit Court of Appeals below found exactly to the contrary. We will not again quote the decision as to these points (see pages 9 to 11 hereof for such quotations) but we again emphasize that the Circuit Court expressly found that Petitioner had consented to the issuance of the patent and that a finding of competency by the Secretary must be presumed from the fact that patent issued. (R. 302, 164 Fed. 2d. at 436)

Petitioner's letter requesting the patent is set out in full in the opinion:

"4505 - 18 Avenue N. E.
"Seattle, Washington
"September 16, 1919

"U. S. Indian Agent of Black Foot Res.
"Browning, Montana

"Dear Sir:

"I see by the Great Falls & Kalispell paper that the Indians of the Blackfeet Reservation are receiving the patents to their land. Will you kindly send mine to the above address if you have it.

"Yours very truly,
Mabel H. Monroe. (R. 302; 169 Fed. 2d. 433 at 436)

The motion for Summary Judgment did *not* admit all of the allegations of Petitioner's Complaint; rather, since by stipulation (R. 227) all issues of *fact* regarding the affirmative defense of *res adjudicata* had been removed, it presented to the court the issue of law as to whether that defense, in itself, was sufficient to dispose of the case. This issue was considered and decided by the court, in advance of and separate from any trial of the other

and more complicated issues raised by the answer and the other defenses therein contained, as authorized by Rule 42 of the Rule of Civil Procedure for the District Courts of the United States.

Vol. 3 Moore's "Federal Practice" page 3051;

Momand v. Paramount Pictures Distributing Co., 6 Fed. Rules Decisions 222;

Karolkiewiez v. City of Schenectady, 28 Fed. Supp. 343;

Momand v. Paramount Pictures Dist. Co., 36 Fed. Supp. 568 at 571;

Billings Utility Co. v. Advisory Committee, 135 Fed. 2d. 108;

Mitchell v. Village Creek Drainage District, 158 Fed. 2d. 475.

A case in point, which clearly distinguishes between a Motion to Dismiss, which *does* admit the allegations, and the *Motion for Summary Judgment* presenting the defense of *res adjudicata* is:

Eberle v. Sinclair Prairie Oil Co., 35 Fed. Supp. 296.

The case of *United States vs. Glacier County*, 17 Fed. Supp. 411, 99 Fed. 2d. 733, despite such statement on page 20 of Petitioner's Brief, did *not* consider the effect of subsequent consent, since it clearly appears that that case was tried and decided upon the basis of a stipulation that the fee patents had issued to the Indians "without any applications on their part and without their consent." (99 Fed. 2d. at page 734).

The Montana Supreme Court in the case of *Glacier County v. Frisbee*, 117 Montana 578, 164 Pac. 2d. 171, cited on pages 20 to 23 of Petitioner's Brief, while conceding that a conveyance of a part of the land was evi-

dence of acceptance of a fee patent by the Indian, refused to hold it so conclusive as a matter of law as to prevent the Indian's introducing any other evidence on the subject of consent, and the case was remanded for further proceedings on such a basis.

The connected case of *United States vs. Glacier County,* 74 Fed. Supp. 745, throws further light on the matter. It was a suit by the United States to cancel the fee simple patent issued to the 320 acres to Florence Samples in June, 1918. It was, like the present case, brought in the Federal District Court of Montana before Judge Pray, and apparently involves the same land and the same patent as was involved in the Montana case of *Glacier County vs. Frisbee,* 117 Mont. 578, 164 Pac. 2d. 171. In the Federal court, the United States was itself a party. The court held that the voluntary conveyance by the Indian of 80 acres of the 320-acre tract covered by the fee patent (even though the record established that she had never made any written application therefor) constituted acceptance of and consent to the issuance of the fee patent. The syllabus of that case is as follows:

"Indians—13 (8)

Where patent to 320 acres of land was issued to Indian allottee in June, 1918, without her request but she did not refuse to accept it, and shortly thereafter she sold 80 acres and declared the remainder for assessment by the state which was later sold for delinquent taxes, United States was not entitled to have the patent canceled or to quiet title to the 240 acres on the ground that it was non-taxable. 25 U. S. C. A. Secs. 352a, 352b." (74 F. Supp. 745).

The lands here in question are situate in Glacier County, Montana, and, a fee simple patent having issued, the Montana court had jurisdiction:

Larkin vs. Paugh,
276 U. S. 431, 48 S. Ct. 366, 72 L. Ed. 640.

In 42 Corpus Juris Secundum "Indians" in pages 811-812 it is stated:

"* * * Where, however, the trust affecting, and the restriction on alienation of, land allotted to an Indian have been terminated by the issuance of a fee simple patent, pursuant to the provisions of 25 U.S.C.A. Sec. 349, all questions relating to title become subject to examination and determination by the courts of the state in which the land is situated, which otherwise have jurisdiction. * * *"

See also: *People v. Pratt,*
26 Cal. App. (2d) 618, 80 Pac. 2d. 87;
Milne v. Leiphart,
(Mont.) 174 Pac. 2d. 805.

United States v. Candelaria, 271 U. S. 432, 40 S. Ct. 561, 70 L. Ed. 1023, where the court, after stating that a decree of a New Mexico court quieting title to Indian lands would not bind the United States, since it was not a party, went on to hold

"* * * our answer to the question [i.e. did the New Mexico court have jurisdiction] is that the state court had jurisdiction to entertain the suit and proceed to judgment or decree."

The fact that Petitioner is an Indian, whether unnaturalized or a citizen does not confer exclusive jurisdiction on the Federal Courts.

Vol. 4 Hughes Federal Practice, Jurisdiction and Procedure, Sec. 2321, Page 96 and Note 99.

U. S. v. Waldo,
294 Fed. 111, affirmed 269 U. S. 13, 46 S. Ct. 1, 70 L. Ed. 138;

Snyder v. Fancher,
7 Fed. Supp. 597;

Button v. Snyder,
7 Fed. Supp. 597;

Deere v. St. Lawrence River Power Company,
32 Fed. 2d. 550.

Presence of a federal question does not deprive the Montana courts of concurrent jurisdiction.

Montgomery's Manual of Federal Jurisdiction and Procedure (4th Ed.) page 74, Sec. 102; page 75, Sec. 103; and page 77, Sec. 106.

Cases collected in 28 U.S.C.A. Sec. 41 (1) Note 404 on page 154, also Note 404 on page 144 of the 1947 Appendix.

U. S. v. Tyler, 269 U. S. 13, 46 S. Ct. 1, 70 L. Ed. 138, where on page 143 of Lawyer's Edition, the court points out that state courts are as competent as federal courts to decide treaty and constitutional questions regarding Indians, and that if a state court denies the Indian a Federal right properly asserted by him, the authority of the Supreme Court of the United States can then be invoked by him.

Error No. 2

As heretofore pointed out (pages 12 to 14) the provisions of Sec. 372, Title 25 U.S.C.A. regarding a certificate of competency apply only when a fee patent containing restrictions against alienation has issued, and not to the present situation where a "trust" patent first issued, followed by a fee patent under the provisions of Sec. 349, Title 25 U.S.C.A.

No cases are cited in support of the statement on page 25 of Petitioner's brief that the courts have held that Section 349 was not applicable to vested rights acquired

by the Blackfeet in their trust lands, and we know of no such cases. In fact, the case of *Glacier County v. Frisbee,* 117 Mont. 578, 164 Pac. 2d. 171, contains a comprehensive review of all of the treaties and statutes affecting Blackfeet lands, and expressly holds that the amendment of the general Indian allotment Act made by the Act of May 8, 1906, 34 Stat. 182, Title 25, U. S. C. A. Sec. 349 (the relevant portions of which are quoted at page 13 hereof) specifically applies to all allotments of lands on the Blackfeet Reservation.

The case of *Larkin v. Paugh, 276* U. S. 431, 48 S. Ct. 366, 72 L. Ed. 640, sustains the jurisdiction of the state court where fee patent has issued, and was properly cited and relied upon in the court below for the proposition that Petitioner's only method of attacking the Montana court's decision was by appeal and *certiorari* to the United States Supreme Court in a direct proceeding.

Error No. 4

This is easily disposed of by reference to the letter, quoted in full by the Circuit Court in its opinion, wherein Petitioner asked for her patent. (See page 18 hereof; also R. 302, and 169 Fed. 2d. 433 at 436). Also the placing by Petitioner of a voluntary encumbrance on the land (R. 122-145) must in law be considered an acceptance of the fee patent. See report of committees of Congress on H.R. 15267 71st Congress, 3d Session, and S 2714, 69th Congress, 1st Session as quoted in *United States v. Glacier County,* 74 Fed. Supp. 745 at page 747.

Error No. 5

It is true that Petitioner was named as a defendant in the state court; however, she did more than simply resist that suit on the basis that the fee patent was forced

on her. Petitioner cross complained and affirmatively asked the Montana state court to quiet title in fee simple in her. (R. 92-94)

The portion of the Enabling Act cited on page 27 of Petitioner's brief retains jurisdiction of Indian land in the Congress of the United States "until the title thereto shall have been extinguished by the United States." It does not apply where, as here, a valid fee patent has issued.

Errors Nos. 6 and 10

As has been pointed out under Error No. 2 and likewise at pages 12 to 14 hereof, the provisions of Section 372 of Title 25, U.S.C.A. regarding a certificate of competency have no application to a case such as this involving a fee patent. Under Section 349 of Title 25 U.S.C.A. the Secretary of the Interior "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs" may cause a fee patent to issue. There is no requirement that the Secretary should make any formal expression or execute a certificate that he is so satisfied; the issuance of the fee patent itself would seem sufficient evidence that he must have been so satisfied. At the very least, its issuance must give rise to the presumption that he performed his official duty in this respect, which must stand unless and until overcome by direct evidence to the contrary, of which there is none in this case. Under Sec. 349 the fee patent itself evidences the finding; under Sec. 372 a new patent is *not* issued, so it is there necessary to execute a certificate as evidence that the restrictions are removed.

The case of *Arenas v. U. S.*, 60 F. Supp. 411, 158 Fed. 2d. 730, cited by Petitioner on page 29, was like-

wise decided by the Circuit Court of Appeals for the Ninth Circuit and deals simply with the right of an Indian to bring suit against the United States to compel the issuance of a trust patent to him. It has no bearing on our present case.

Errors Nos. 7, 8 and 9

As heretofore demonstrated (pages 11 to 12) the Treaty of 1887 referred to on page 30 of Petitioner's brief, insofar as it deals with allotments, refers only to lands ceded by the Indians to the United States, and not to lands within the Blackfeet Reservation, as the lands here in question concededly are. (R. 5)

We again point out that the provisions of Section 372 of Title 25 U.S.C.A. regarding a certificate of competency have no application to a case such as this where a trust patent is involved (See pages 12 to 14 hereof).

Error No. 11

Fee patent having issued, the Montana court had jurisdiction to determine all questions of title.

Larkin v. Paugh, 276 U. S. 431, 48 S. Ct. 366, 72 L. Ed. 640 and other authorities heretofore cited on page 21 hereof.

The trial in the Montana court was obviously on the merits as the complete record demonstrates (R. 65-215). That record showed a fee patent issued to Petitioner on December 12, 1918, (R. 159-161), a mortgage given by Petitioner on October 13, 1920, (R. 129), a foreclosure thereof thereafter had, and Sheriff's Deed issued to Respondent; Sherburne Mercantile Company on December 20, 1923. (R. 154-159)

The Montana court, in support of its decree quieting the title of Respondent Sherburne Mercantile Company

against the claims of Petitioner (R. 205-206) made the following finding of fact, among others (R. 197):

"2. That Plaintiff is now, and ever since the 20th day of December, 1923, has been, the owner and entitled to the possession of the lands described in Plaintiff's Complaint." Of necessity, this is a finding that a valid patent had issued, a valid mortgage was given, and a valid foreclosure thereof had, as a result of which title and ownership passed to Sherburne Mercantile Company on the very day Sheriff's Deed was executed to it. Obviously such a finding is not based upon adverse possession, as Petitioner contends on page 32.

Error No. 12

This simply states a general conclusion without specifying any particular error and as such needs no discussion.

B: CONCLUSION

It is respectfully submitted that the decisions of the District Court and Circuit Court below were correct and must be affirmed if review is granted.

Respectfully submitted,

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APPENDIX

25 Stat. 113.

"Chap. 213. An act to ratify and confirm an agreement with the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana, and for other purposes."

* * *

"Article II. The said Indians hereby cede and relinquish to the United States all their right, title, and interest in and to all the lands embraced within the aforesaid Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Reservation, not herein specifically set apart and reserved as separate reservations for them, and do severally agree to accept and occupy the separate reservations to which they are herein assigned as their permanent homes, and they do hereby severally relinquish to the other tribes or bands respectively occupying the other separate reservations, all their right, title, and interest in and to the same, reserving to themselves only the reservation herein set apart for their separate use and occupation." (Page 114)

* * *

"It is hereby agreed that the separate reservation for the Indians now attached to and drawing rations at the Blackfeet Agency shall be bounded as follows, to-wit:

"Beginning at a point in the middle of the main channel of the Marias River opposite the mouth of Cut Bank Creek; thence up Cut Bank Creek, in the middle of the main channel thereof, twenty miles, following the meanderings of the creek; thence due north to the northern boundary of Montana; thence west along said boundary to the summit of the main chain of the Rocky Mountains;

thence in a southerly direction along the summit of said mountains to a point due west from the source of the North Fork of Birch Creek; thence due east to the source of said North Fork; thence down said North Fork to the main stream of Birch Creek; thence down Birch Creek, in the middle of the main channel thereof, to the Marias River; thence down the Marias River, in the middle of the main channel thereof, to the place of beginning.

Dated and signed at the Blackfeet Agency, Montana, on the eleventh day of February, eighteen hundred and eighty-seven.

JNO. V. WRIGHT,
JARED W. DANIELS,
CHARLES F. LARRABEE,
Commissioners."

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